Emsing's Supermarket, Inc., Rocky's Supermarket, Inc., a Single Employer *and* United Food and Commercial Workers Union, Local 1460, AFL–CIO, CLC. Case 13–CA–24609

April 30, 1992

SECOND SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On March 29, 1991, Administrative Law Judge Claude R. Wolfe issued the attached supplemental decision in this proceeding.[1] The Respondents filed exceptions and a supporting brief, and the General Counsel filed a brief in response to the Respondents' exceptions and in support of the judge's supplemental decision. The General Counsel also filed cross-exceptions and a supporting brief and the Respondents filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Second Supplemental Decision and Order.

The issue presented by the Respondents' exceptions is whether the Respondents' backpay obligation was limited to or exceeded the 2-week minimum backpay called for in the Board's Decision and Order modeled on the remedy provided in *Transmarine Navigation Corp*., 170 NLRB 389 (1968).

As detailed in the judge's remedy, 284 NLRB at 316, the Respondents were ordered to pay the unit employees on the payroll on August 1, 1984, amounts at the rate of their normal wages when last in Emsing's Supermarket, Inc.'s employ *from 5 days after the date of the Board's Order* until the occurrence of the earliest of the following conditions:

> 1. The date ESI bargains for agreement with the Union on those subjects pertaining to the effects of the closing on the unit employees.
>
> 2. A bona fide impasse in bargaining.
>
> 3. *The failure of the Union to request bargaining within 5 days of the Board's order*,[38] *or to commence bargaining within 5 days of ESI's notice of its willingness to bargain with the Union.* [Emphasis added.]
>
> 4. The subsequent failure of the Union to bargain in good faith.

1. The first area of inquiry presented by the Respondents' exceptions is whether the Union complied with its obligations under the Board's Order and timely requested bargaining within 5 days of the Board's Order, thus triggering the beginning of the backpay period.

The Board's Order issued June 18, 1987.[2] The General Counsel has not affirmatively proved the date of receipt of the Board's Order. The Union sent a telegram requesting bargaining to ''Allen [sic] Emsing'' at Rocky's Supermarket on June 23, but it was not received by Alan Emsing until June 25.

As framed by the judge, the question is whether the ''5 days'' requirement for requesting bargaining set forth in the remedy should be 5 successive calendar days, 5 working days or business days, or be based on some other measure. A related question is whether the date of issuance or the date of receipt of the Board's Order is the triggering event that begins the countdown. The judge found that the 5-day period started to run from the date of issuance of the Board's Decision and Order, but he excluded the intervening Saturday and Sunday from the computation and found that the 5-day period expired on June 25. Accordingly, he found the Union's bargaining request to be timely.

We agree that the Union's request to bargain was timely communicated. We do not, however, agree with the judge's understanding of the ''five day'' requirement, and shall take this opportunity to clarify its application.

After carefully considering both the policy consideration underlying the 5-day rules, i.e., the desire to encourage due diligence, and the practical exigencies imposed by mail and delivery services, we have decided that, in applying the *Transmarine* remedy, the countdown for the 5-day period for requesting bargaining begins on the first business day after the *date of receipt* of the Board's Decision and Order by the legal representative of the party obligated to request bargaining. The date of issuance of the Decision and Order is, therefore, irrelevant in computing the 5-day period. In

[1] In the underlying unfair labor practice case, the Board found that the Respondent Emsing's Supermarket, Inc. violated Sec. 8(a)(5) and (1) of the Act by unilaterally discontinuing payments to contractual benefit funds, by unilaterally discontinuing payments to employees for vacations, and by failing to give United Food and Commercial Workers Union, Local 1460, AFL–CIO, CLC adequate notice of its decision to close its operation, thereby precluding meaningful bargaining over the effects of closing. The Board also found that Respondent Emsing's Supermarket, Inc. and Respondent Rocky's Supermarket, Inc. constitute a single employer and are therefore jointly and severally liable for remedying the violations found. 284 NLRB 302 (1987), affd. 872 F.2d 1279 (7th Cir. 1989). Following receipt of the Respondent's answer to the backpay specification, the General Counsel filed a Motion to Strike Portions of the Answer and a Motion for Partial Summary Judgment. The Board granted the motions in part and, as recited by the judge, remanded the proceeding for a hearing limited to taking evidence concerning ''the length of the backpay period, interim earnings, gross and net backpay, and liquidated damages if any owed to the trust funds and health and welfare funds.'' 299 NLRB 569 (1990).

[2] All dates are 1987 unless otherwise stated.

addition, intervening Saturdays, Sundays, or legal state or Federal holidays shall be excluded in computing the 5-day period. Further, if the party requesting bargaining chooses to communicate its request by mail, by telegram, or by some other written form of communication, that communication will be timely if it is postmarked on or before the 5th day. Thus, there is no requirement that the written communication be received by the other party within the 5-day period.

Here, there is no evidence in the record as to what date the Charging Party Union's legal representative actually received the Board's Decision and Order. We conclude, nevertheless, that the Union's telegram requesting bargaining with Alan Emsing was timely sent because the earliest date of receipt of the Board's Decision and Order would have been Friday, June 19, and the 5-day period would have begun on Monday, June 22, and would have expired—at the earliest—on June 26, 3 days *after* the Union actually sent the request to bargain. Accordingly, we agree with the judge that the Union's request to bargain was timely communicated.[3]

2. The second issue is whether, under the *Transmarine* requirement, the Union commenced bargaining within 5 days of Emsing's Supermarket, Inc.'s notice of its willingness to bargain. The judge found, and we agree, that Respondent Emsing's did not express its willingness to bargain with the Union (thus triggering the Union's obligation to ''commence bargaining'') until September 21. On that date, the Respondent's attorney wrote to the Union's attorney stating, in relevant part, ''Emsing's has already offered to and will meet with Local 1550 at its earliest convenience. Please check with your client and advise by return mail of at least four (4) alternate dates when Local 1550 is available to meet.'' Responding to Emsing's by letter dated September 22, the Union proposed four alternate bargaining dates, the earliest being September 30.

The Union's and the Respondent's negotiators met face to face for the first time on September 30. The judge found that this first meeting constituted the beginning of bargaining. He observed that this September 30 meeting occurred more than 5 days after Respondent Emsing's expressed a willingness to bargain on September 21. Finding that the Union thus had not complied with the *Transmarine* 5-day requirement regarding the commencement of bargaining, the judge concluded that the backpay period ended on September 29. This was 5 business days after the Union's September 22 receipt of the Respondent's letter.

We disagree that the backpay period ended on September 29. In our view, the date the parties first met to negotiate face to face was not when ''bargaining'' actually ''commenced'' within the meaning of *Transmarine*. In the context of collective bargaining under the constraints imposed by *Transmarine*, negotiating over when to meet is one aspect of ''bargaining.'' In light of the overall purpose of the 5-day rule, i.e., to ensure the union's prompt response to the respondent's expression of its willingness to bargain, the Union fulfilled its obligation by responding on September 22 to the Respondent's September 21 letter and by attempting to comply with the Respondent's request by suggesting possible meeting dates. We find that collective-bargaining negotiations began on September 22.[4]

Although the judge found it unnecessary to determine whether there was a later impasse in bargaining or whether there was bad-faith bargaining by the Union that would have curtailed the backpay period, we find, in agreement with the General Counsel, that impasse was reached and backpay tolled on October 22, 1987, the date when the Union received the information that it had requested and made no further attempts to bargain. The backpay period thus totaled 17.6 weeks.[5]

ORDER

The National Labor Relations Board orders that the Respondents, Emsing's Supermarket, Inc., Griffith, Indiana, and Rocky's Supermarket, Inc., Hammond, Indiana, their officers, agents, successors, and assigns, shall jointly and severally make whole the employees

[3] Even assuming, for argument's sake, that the Union had an obligation to request bargaining within 5 calendar days of the issuance of the Board's Decision and Order, we would find, as did the judge, that the Union met its obligation. The Union's June 23 bargaining request was within 5 calendar days of the Board's June 18 Decision and Order.

[4] This conclusion is not inconsistent with our holding in *Van Dorn Plastic Machinery Co*., 300 NLRB 278 (1990), enfd. 939 F.2d 402 (6th Cir. 1991), where the Board held that the parties' first bargaining meeting is the triggering event which marks the beginning of the certification year. The circumstances in *Van Dorn*—and thus the attendant policy goal—are different from those in *Transmarine*. In *Van Dorn*, for years after the union had been certified the employer did not acknowledge its bargaining obligation by meeting with the union to bargain. As the certification year rule is intended to provide the union with a period of 1 year of good-faith bargaining during which the bargaining representative need not fend off claims that it has lost its majority support, the event triggering the commencement of this year is narrowly construed to afford the union 1 full year of bargaining at the table.

In contrast, the *Transmarine* 5-day rule is intended to encourage the parties to begin a dialogue leading to negotiations—not over an initial collective-bargaining agreement—but over an employer's previous refusal to bargain about the effects of its decision to close its operation. In this situation, our focus is not on protecting the integrity of a certification year, but on inducing a prompt response to a party's expression of a willingness to bargain. Thus, our interpretation of when bargaining begins in the context of a *Transmarine* remedy is necessarily broad.

[5] In their posthearing brief to the judge, the Respondents assert that the *Transmarine* minimum 2-week period is the appropriate backpay period and do not otherwise specifically contest October 22 as the impasse date.

named below by paying them the amounts of backpay set forth opposite their names, plus interest accrued to the date of payment, in the manner prescribed in *New Horizons for the Retarded*,[6] less tax withholdings required by Federal and state laws, and by paying to the Pension Trust Fund and the Health and Welfare Trust Fund of United Food and Commercial Workers Union, Local 1460, AFL–CIO, CLC, the respective delinquent contributions on their behalf set forth opposite their names, plus additional liquidated damages in the amount of $3.21 per month to the Pension Trust Fund, starting from January 10, 1991, to the date of payment of the delinquent contribution to the Pension Trust Fund, plus additional liquidated damages in the amount of $7.20 per month to the Health and Welfare Trust Fund, from January 10, 1991, to the date of payment of the delinquent contribution to the Health and Welfare Trust Fund.

Joel Bratcher	$195.94
Bertha Eriks	2,673.62
Cathy Eriks	1,432.64
John Hadjuch	1,589.46
Blanche Harshbarger	3,580.57
Lisa Hinton	191.98
Jackie Jansen	2,520.70
Mary Smith	1,536.50
Pension Trust Fund	474.79
plus liquidated damages	589.07
Health and Welfare Trust Fund	$960.00
plus liquidated damages	1,197.60

[6] 283 NLRB 1173 (1987).

Jessica T. Willis, Esq., for the General Counsel.
J. Charles Sheerin, Esq., for the Respondent.
Jairus M. Gilden, Esq., for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge. This backpay proceeding was litigated before me at Chicago, Illinois, on January 9, 1991, pursuant to a Supplemental Decision and Order Remanding[1] issued by the National Labor Relations Board on August 27, 1990, as the latest in a sequence of events involving the Respondents. On June 18, 1987, the Board issued a Decision and Order[2] against the Respondents, Emsing's Supermarket, Inc. and Rocky's Supermarket, Inc., in which the Respondents were ordered to make whole unit employees of Emsing's Supermarket, Inc. for any loss of pay they might have suffered as a result of Respondent Emsing's violations of Section 8(a)(5) and (1) of the Act. The Respondents were also ordered to pay all unit employees entitled to vacations in 1984 the payments due them, and to pay all delinquent contributions to the pension trust fund and health and welfare trust fund. On April 17, 1989, the Court of Appeals for the Seventh Circuit enforced the Board's Order.[3] On July 20, 1989, the Regional Director for Region 13 issued a backpay specification and notice of hearing alleging the amount of backpay due the employees and the trust funds. Respondents filed an answer. On October 20, 1989, the General Counsel filed a motion to strike portions of Respondents' answer to backpay specification and for partial summary judgment. Respondents filed a response to this motion on November 29, 1989. The Board, in its August 27, 1990 Supplemental Decision and Order Remanding granted General Counsel's motion ''with respect to all allegations in the backpay specification, except as to the length of the backpay period, the amount of gross and net backpay (i.e., only to the extent that they are affected by the length of the backpay period), interim earnings, and the amount of liquidated damages, if any,'' and ordered the scheduling of a hearing before an administrative law judge, ''limited to taking evidence concerning the length of the backpay period, interim earnings, gross and net backpay, and liquidated damages if any owed to the trust funds and health and welfare funds.'' I have conducted that hearing and, after considering all the record evidence and the posttrial briefs of the parties, make the following findings and conclusions.

Interim Earnings

With respect to interim earnings, it is the Respondents' burden, not General Counsel's, to prove interim earnings.[4] Respondents proffered no evidence and none was adduced concerning interim earnings. Respondents have therefore not carried their burden of showing interim earnings not reflected in the backpay specification.

The Board held in its Supplemental Decision and Order Remanding that the following allegation in the backpay specification be deemed admitted by reason of Respondents' failure to file a proper denial:

> As set forth in ''the Remedy'' of the Board's Decision and Order, Respondents are directed to pay the unit employees on the payroll as of August 1, 1984 amounts at the rate of their normal wages when last in Emsing's Supermarket, Inc.'s employ from 5 days after the date of the Board's Order until the occurrence of the earliest of the following conditions:
>
> 1. the date Emsing's Supermarket, Inc. bargains for agreement with the Union on those subjects pertaining to the effects of the closing on the unit employees;
>
> 2. a bona fide impasse in bargaining;
>
> 3. the failure of the Union to request bargaining within 5 days of the Board's Order, or to commence bargaining within 5 days of Emsing's Supermarket, Inc.'s notice of its willingness to bargain with the Union; or
>
> 4. the subsequent failure of the Union to bargain in good faith.

[1] 299 NLRB 569.
[2] 284 NLRB 302.
[3] 872 F.2d 1279.
[4] See, e.g., *Iron Workers Local 373 (Building Contractors)*, 295 NLRB 648 (1989).

The sum paid to any of these employees shall not exceed the amount each would have earned as wages from August 11, 1984, the date Emsing's Supermarket closed, to the time he secured equivalent employment elsewhere, or the date on which Emsing's Supermarket, Inc. offers to bargain, whichever occurs sooner; provided, however, that in no event shall this sum be less than the employees would have earned for 2-week period at the rate of their normal wages when last in Emsing's Supermarket, Inc.'s employ.

The 5-day Requirements

The Request for Bargaining

Respondent argues that the Union failed to meet either of the 5-day requirements set forth in item 3 above. General Counsel and the Union disagree. Turning first to the question of whether the Union requested bargaining within 5 days of the Board's Order issued June 18, 1987, Ronald Luesmann, then president of Local 1550 with which Local 1460 merged in January 1985, credibly testified and the evidence shows the Union sent a telegram to the attention of Allen (sic) Emsing at Rocky's Supermarket on June 23, 1987. On June 24, the Union received a Western Union mailgram reading, in relevant part, as follows:

4–0159578174002 06/23/87 ICS IPMBNGZ CSP CGAB
1 3126661313 MGM TDBN CHICAGO IL 06–23 1235P EST

UFCW LOCAL 1550 PA
320 SOUTH ASHLAND AVE
CHICAGO IL 60607

THIS IS A CONFIRMATION COPY OF THE FOLLOWING MESSAGE:

3126661313 FRB TDBN CHICAGO IL 24 06–23 1235P EST PMS ROCKY'S SUPERMARKET ATTN ALLEN EMSINGS, DLR ASAP RPT DLY MGM, DLR

5600 SHOL
HAMMOND IN 46230

IN CONFORMITY WITH THE NATIONAL LABORS RELATIONS BOARD ORDER, UFCW LOCAL 1550 DEMANDS COLLECTIVE BARGAINING OVER THE EFFECTS OF THE CLOSING OF EMSINGS SUPERMARKET.

RONALD S LUESMANN PRES UFCW LOCAL 1550
320 SOUTH ASHLAND AVE
CHICAGO IL 60607

12:30 EST
MGMCOMP

Alan Emsing, co-owner of Rocky's Supermarket, testified that he received the following telegram in his morning mail on June 25, 1987:

IPM23IN
4–015957S174 06/23/87
ZCZC 3126661313 FRB TDBN CHICAGO IL 24 06–23 1235P EST
PMS ROCKY'S SUPERMARKET ATTN ALEN EMSINGS, DLR ASAP RPT DLY MGM, DLR

5600 SHOL
HAMMOND IN 46230

BT

IN CONFORMITY WITH THE NATIONAL LABORS RELATIONS BOARD ORDER, UFCW LOCAL 1550 DEMANDS COLLECTIVE BARGAINING OVER THE EFFECTS OF THE CLOSING OF EMSINGS SUPERMARKET.

RONALD S LUESMANN PRES UFCW LOCAL 1550
320 SOUTH ASHLAND AVE
CHICAGO IL 60607

NNNN
1231 EST
IPM23IN

According to Emsing, he immediately called his counsel, advised him of the telegram, and discussed with his counsel whether there was any need to bargain in view of the failure to receive the message within 5 days of the Board's Order. Emsing denies receiving any communications other than the telegram from Western Union on June 23, 24, or 25, and asserts he established June 25 as the date of receipt of the telegram by reviewing his telephone bill, which purportedly shows he called his lawyer on June 25, and because he calls his lawyer as soon as he receives anything pertaining to this proceeding. His telephone record was not offered into evidence.

J. Charles Sheerin, Respondent's counsel, testified that Emsing consulted with his over the phone in June 1987 concerning the telegram he received from Luesmann, and that he advised Emsing it might be an untimely request. Sheerin does not say what date in June 1987 this call took place.

The Union clearly sent a request for bargaining via Western Union telegram[5] on June 23, the 5th day after the issuance of the Board's decision, and it clearly was received. No Western Union representative or other expert was called to explain Western Union procedure or the meaning of the various coded notations on the Western Union messages set forth above. I have examined and reexamined these documents several times and conclude that they confirm Luesmann's testimony the telegram was given to Western Union to transmit on June 23, but they do not show on their face, absent an explanation of the various coded entries, that they were delivered the same day or any other date.

[5] Respondent's brief misquotes the transcript of record at p. 33, L. 18 by substituting ''day letter'' for ''telegram,'' and by stating that union representatives decided to ask their attorney to dictate a ''day letter'' when in fact the record, at pp. 35–36, cited by Respondent, plainly recites the plan was to ask the Union's attorney to dictate a ''telegram.'' Moreover, Respondent's posttrial brief consistently refers to a ''day letter'' when describing Alan Emsing's testimony and making other references to the Union's message. The use of this descriptive term is solely a construct of counsel utilized, I believe, for purposes of persuasion and having no evidentiary value.

Emsing's denial of any phone call or other communication concerning the telegram until he received it on June 25 is uncontroverted. Even though the failure of Respondent to place the supporting telephone bill in evidence and the failure of Attorney Sheerin to testify to the date on which Emsing contacted him concerning the telegram weakens the persuasiveness of Emsing's testimony concerning his receipt of the Union's request, General Counsel has not affirmatively proved the date of delivery, or rebutted Emsing's testimony that he did not receive the message until 7 calendar days after the date of the Board's Order. I conclude, however, that the fact Respondent received the request to bargain on June 25 is not a determining factor because neither the Board's Decision and Order nor the backpay specification require receipt of the Union's request within 5 days of the issue date of the Decision and Order. All that is required is that the Union ''request bargaining within 5 days of the Board's Order.'' The Union has done so. That the Respondent is under no obligation to respond until it receives such a request does not alter the fact it has been sent. To hold otherwise would require an interpretation of the Board's ''5 day'' language to mean that the Union must in fact dispatch its request with 4 days of the Board's decision, at the latest, to assure receipt within the 5 days, or hand deliver the request. Further, if this were so the Union would in fact have only 3 days, allowing 1 day for the delivery of the Board's decision to the Union, within which to consider it and dispatch an appropriate request. I do not believe the Board intended to make it that difficult for the Charging Party to comply with the Board's requirements concerning the determination of the length of the backpay period by requiring the request be received within 5 days of its decision. I therefore find the Union met the condition by sending the request by telegram on June 23.

The foregoing conclusion is, I believe, dispositive of the issue. There are, however, other considerations which the Board may wish to consider, but the parties have not adequately addressed. Footnote 6 of the Supplemental Decision and Order Remanding states, ''By making reference to the 5-day notice prerequisite, we do not pass on whether the 5 days begin to run from the date of issuance of the Board's Order or from the date of receipt by the Union or its counsel.'' The underlying decision refers to 5 days, but does not delineate how those days should be computed, whether calendar days, working days, or some other measure. That the parties have apparently construed the Board's language to refer to 5 successive calendar days is not dispositive, but it is difficult to ascertain from Board decisions just how the Board counts its days in backpay situations involving a *Transmarine*[6] remedy because those decisions[7] simply do not definitively explain how the ''5 days'' shall be calculated. In assessing the validity of offers of reinstatement to discriminatorily discharged employees requiring them to respond within a very few days the Board has found such offers invalid where there was an intervening holiday and/or weekend at which time the employee would have been unable to discuss the matter with the employer,[8] thus providing an unreasonable amount of time (4 days) for the recipient to consider and reply to the offer. The Board has also concluded such an offer to be invalid where it only gave the employees 5 days after the offer to accept it,[9] and the Board has long required that employees be afforded a reasonable time to consider such offers.[10] Moreover, with certain limited exceptions, the computation of time with respect to periods of 7 days or less prescribed or allowed by the Board's Rules and Regulations for service and filing of papers excludes intermediate Saturdays, Sundays, and holidays.[11] When the Board issues a decision on any day from Tuesday through Friday the succeeding 5 calendar days include a Saturday and a Sunday. Only a Monday issuance escapes a Sunday, but the succeeding 5 calendar days include a Saturday. It seems unlikely that the Board requires a Union to request bargaining on a Saturday or Sunday, or that the employer would be readily available to accept such a demand on either day even if delivered by hand. Given the Board's long history of requiring offers of reinstatement to afford employees a reasonable time within which to consider and reply to them, and its reasonable exclusion of Saturdays, Sundays, and holidays from that time, together with its exclusion of those days from the computation of periods of 7 days or less which are prescribed or allowed for the service and filing of papers, I am persuaded that the Board intended its ''within 5 days'' rule utilized in cases involving *Transmarine* remedies to be reasonably construed, which I believe requires the exclusion of Saturdays, Sundays, and holidays from the 5-day computation. In the instant case the inclusion of Saturday and Sunday in the computation would effectively give the Union only 3 workdays within which to make its request. I therefore find it is reasonable to conclude that the 5 days referred to by the Board in its Thursday, June 18, 1987 Order and the backpay specification excludes Saturday and Sunday, June 20 and 21, and gave the Union at least until May 25 to make its request, the date Respondents received it.

Should the Board conclude the 5 days are calendar days, whether the period runs from the date of issue or date of receipt of the Board's Order becomes important. The Board controls both the issue date and the transmission date of its decisions, and the date of receipt should control. The Decision and Order in 284 NLRB 302 has an issue date of June 18, a Thursday. Even if mailed on that date, the Union would not have received it until June 19 at the earliest, and would have only 4 days, including a Saturday and Sunday, rather than the 5 allotted by the Board, within which to consider the Decision and Order and take the appropriate action. I do not believe the Board would knowingly direct a party to accomplish something in 5 days, but only provide the party with 4. ''Within 5 days of the Board's Order'' is broad enough to encompass the date the Order is received as a

[6] *Transmarine Navigation Corp*., 170 NLRB 389 (1968).

[7] See, e.g., *Marlyn Mfg. Co*., 299 NLRB No. 129 (Sept. 26, 1990) (not reported in Board volumes); *Cole's Bakery*, 299 NLRB No. 96 (Aug. 31, 1990) (not reported in Board volumes); *Challenge-Cook Bros*., 299 NLRB 434 (1990); *John R. Cowley & Bro., Inc*., 297 NLRB 770 (1990); *Continental Hagen Corp*., 296 NLRB No. 55 (Aug. 31, 1989) (not reported in Board volumes); *Paramount Poultry*, 294 NLRB 867 (1989); *Apple Jack Mining Corp*., 294 NLRB 293 (1989).

[8] *A & T Mfg. Co*., 280 NLRB 916, 919 (1986); *Brenal Electric*, 271 NLRB 1556, 1568 (1984).

[9] *Marlene Industries Corp*., 255 NLRB 1446, 1464 (1981).

[10] *Betty Baking Co*., 173 NLRB 1018 (1968), citing *Thermoid Co*., 90 NLRB 614 (1950), and *Harrah's Club*, 158 NLRB 758 (1966).

[11] Sec. 102.111(a), Rules and Regulations, National Labor Relations Board.

starting point for the 5-day period, and I conclude the receipt date is the most reasonable. Accordingly, if the Board does not agree that the union request was timely for any of the reasons earlier discussed, I recommend the case be remanded for the limited purpose of determining the date the Union and/or its lawyer received the Board's Order, and that the 5 calendar days be computed from that date.

The Commencement of Bargaining

Respondents' attorney Sheerin testified he called the Union's office and asked for Luesmann on September 4. He advised Luesmann's secretary that he was responding to the telegram and was calling in regard to that matter. Sheerin then asked her to have Luesmann call him, left his name and telephone number, and the call ended. This telephone call does not constitute notice to the Union of Respondents' willingness to bargain.

On September 18, Jarius Gilden, the Union's attorney, directed a letter to Sheerin reading, in relevant part, as follows:

> Mr. Ronald Luesmann, President of UFCW Local 1550, has informed me that you contacted him recently. I assume that your contact was in response to Local 1550's telegram of June 24, 1987 demanding bargaining over the effects of the closing of Emsing's Supermarket. Local 1550 is available to bargain at your earliest convenience.

Sheerin replied to Gilden by letter dated September 21 reading, in relevant part, as follows:

> As you are aware, neither the June 24, 1987 telegram or your September 18, 1987 letter were timely within the express provisions of the Decision and Order of the National Labor Relations Board. Nevertheless, and without abandoning or waiving any argument or legal position based upon these defects, Emsing's has already offered to and will meet with Local 1550 at its earliest convenience. Please check with your client and advise by return mail of at least four (4) alternate dates when Local 1550 is available to meet.

Gilden replied to Sheerin by letter of September 22 reading as follows, again in pertinent part:

> I am responding to your letter of September 21, 1987. As you are aware, the National Labor Relations Board issued an Order on June 18, 1987 directing Emsing's to bargain with Local 1550 over the effects of the closing of its supermarket. Local 1550's June telegram expressly refers to that Decision. Local 1550's offer to bargain contained in that telegram and Emsing's willingness to comply are inherently related to the litigation in NLRB Case No. 13–CA–24609.
>
> With regard to the date of the telegram demanding bargaining, I have reexamined that document and notice that my letter of September 18, 1987 incorrectly identified the date as June 24, 1987. That telegram is dated June 23, 1987. The demand contained in the telegram is timely within the meaning of the National Labor Relations Board's Decision and Order in this matter.
>
> Local 1550 will be available for bargaining on September 30, October 1, October 7 or October 8, 1987. Please advise if any of these dates is acceptable.

The Union and Respondent had their first bargaining session on September 30, 1987.

Sheerin's September 21 letter clearly advised the Union's counsel that Respondents were willing to bargain. It is equally clear that, pursuant to the Union's request, bargaining did not commence until September 30, more than 5 days after Respondents expressed a willingness to bargain, whether the time be calculated on calendar days or excluding Saturday and Sunday. I therefore find the backpay period ended on September 29, 5 working days after Gilden received Sheerin's letter on September 22. The backpay period runs from June 23, the day the Union made its request to bargain, to September 29. It is therefore unnecessary to determine whether there was a later impasse in bargaining or bad-faith bargaining by the Union which would have curtailed the backpay period.

Computation of Backpay

Inasmuch as the backpay period June 23 to September 29, 1987, found here, differs from that in the backpay specification, except for that of Joel Bratcher and Lisa Hinton who are entitled to 2 weeks pay which is accurately set forth in the specification, the backpay for the other six employees named in the specification has been recompute on a calendar quarter basis by multiplying the amount of hours they would have worked by their individual rates of pay.[12] On the basis of a 5-day workweek, there was 1-1/5 weeks backpay due in the second quarter of 1987 and 13-1/5 weeks in the third quarter of 1987. None of the employees had deductible interim earnings. Gross backpay is therefore net backpay. The vacation pay due Blanche Harshbarger, Jackie Jansen, and Mary Smith computed in the backpay specification has been deemed admitted by the Board and is included in the amounts due. As computed by General Counsel, Joel Bratcher is due $195.94 plus interest thereon and Lisa Hinton is due $191.98 plus interest. The other employees involved in this proceeding are entitled to backpay, with interest, as computed below:

[12] The backpay specification sets forth each employee's hourly wage and the number of hours per week each worked, on average, prior to plant closure. I have utilized those figures in the recomputation.

Bertha Eriks

Qtr. 2	1.2 wks. x 22.81 hrs. x $6.66 rate	= $ 182.28	gross backpay (net backpay)
Qtr. 3	13.2 wks. x 22.81 hrs. x $6.66 rate	= $2005.26	gross backpay (net backpay)
	Vacation pay	0	
	Total backpay	$2187.54	

Cathy Eriks

Qtr. 2	1.2 wks. x 20.35 hrs. x $4.00 rate	= $ 97.68	gross backpay (net backpay)
Qtr. 3	13.2 wks. x 20.35 hrs. x $4.00 rate	= $1074.48	gross backpay (net backpay)
	Vacation pay	0	
	Total backpay	$1172.16	

John Hadjuch

Qtr. 2	1.2 wks. x 21.15 hrs. x $4.27 rate	= $ 108.37	gross backpay (net backpay)
Qtr. 3	13.2 wks. x 21.15 hrs. x $4.27 rate	= $1192.10	gross backpay (net backpay)
	Vacation pay	0	
	Total backpay	$1300.47	

Blanche Harshbarger

Qtr. 2	1.2 wks. x 23.13 hrs. x $7.47 rate	= $ 207.37	gross backpay (net backpay)
Qtr. 3	13.2 wks. x 23.13 hrs. x $7.47 rate	= $2280.67	gross backpay (net backpay)
	Vacation pay	$ 539.64	
	Total backpay	$3027.68	

Jackie Jansen

Qtr. 2	1.2 wks. x 24.71 hrs. x 5.26 rate	= $ 155.96	gross backpay (net backpay)
Qtr. 3	13.2 wks. x 24.71 hrs. x $5.26 rate	= $1715.65	gross backpay (net backpay)
	Vacation pay	$ 233.23	
	Total backpay	$2104.84	

Mary Smith

Qtr. 2	1.2 wks. x 21.79 hrs. x $3.75 rate	= $ 98.06	gross backpay (net backpay)
Qtr. 3	13.2 wks. x 21.79 hrs. x $3.75 rate	= $1078.61	gross backpay (net backpay)
	Vacation pay	$ 98.40	
	Total backpay	$1275.07	

Liquidated Damages

The backpay specification, consistent with the Board's Decision and Order in 284 NLRB 302, alleges contributions to the Union's pension trust fund in the amount of $474.79 and the Union's health and welfare trust fund in the amount of $960 are owed by Respondents. The Board granted General Counsel's motion to strike Respondent's denial. It is therefore settled that these contributions are due and owing.

In addition to the $960 contribution described above, the backpay specification also alleges liquidated damages for delinquent contributions to the above-described trust fund. Respondent denies the applicability of liquidated damages. The Board considered this denial sufficient to require General Counsel to prove the appropriateness of the liquidated dam-

ages. The last collective-bargaining agreement between Emsing's Supermarket and the Union contained the following provisions:

ARTICLE XXI - COLLECTION OF DELINQUENT CONTRIBUTIONS

> 21.1 Any Employer who is sixty (60) days delinquent in the payment of any or all of the contributions required of it by the above Articles; Health and Welfare and Pension, shall pay, as liquidated damages, a sum of Twenty Dollars ($20.00), or ten percent (10%) of the amount delinquent, whichever is greater. Such damages shall be computed monthly and on a separate basis for the Health and Welfare Fund and the Pension Fund. The amount of liquidated damages shall be added to the cumulative total of delinquent contributions and shall be included in the computation of damages.
>
> 21.2 In addition to the foregoing, an Employer delinquent sixty (60) days or more shall be liable for the payment of any benefits paid or otherwise payable to an employee or his dependents from the Health and Welfare Trust Fund as a result of any claim incurred during the period of delinquency. Said liability shall not be waived by payment of the amount delinquent, including the liquidated damages, or by payment of the claim by the Health and Welfare Trust Fund.

Contrary to Respondents' argument that ''Neither a pension trust agreement or provisions for liquidated damages in regard to delinquent pension contributions were mentioned in the expired collective bargaining agreement,'' it is clear this representation is incorrect from article XXI recited above and *Article XX-PENSION* of the safe agreement which states, in relevant part:

> 20.6 Contributions shall be made to a jointly administered Pension Trust Fund to be trusteed and administered in accordance with existing law and in accordance with the Pension Plan and Trust Agreement existing between the parties. Said contributions shall be for the sole purpose of providing pensions for eligible employees as defined in such Pension Plan.

Moreover, the Board's Order requiring Respondents to reimburse the pension and health and welfare trust funds makes it clear those funds exist.

The applicability of liquidated damages is readily apparent from a reading of article XXI of the collective-bargaining agreement which contains a formula for the computation of the damages. General Counsel did not compute damages in accord with this formula, but employed a formula set forth in (1) Amendment No. 5 to Revised Trust Agreement of United Food and Commercial Workers Union Local No. 1460 and Employers Insurance Fund (Amendment 5), and (2) the United Food and Commercial Workers Unions and Employers Midwest Pension Fund Agreement and Declaration of Trust. (Midwest Pension Fund) the latter document, was rejected from evidence for want of an appropriate foundation for its proffer. A careful reading of the record persuades me the Midwest Pension Fund, General Counsel's Exhibit 4, was erroneously rejected and should be, and hereby is, received in evidence on the basis of the testimony of Arthur Primm, a business agent for the Union, that to the best of his knowledge it was the pension trust agreement in effect during the existence of the Emsing's Supermarket collective-bargaining agreement referred to above, which I conclude was in fact the case. It provides, at article V(d) for damages as follows:

> The parties recognize and acknowledge that the regular and prompt payment of Employer Contributions to the Trust is essential to the continued efficient administration of the Trust, and that it would be extremely difficult, if not impracticable, to fix the actual expense and damage to the Trust which would result from the failure of an individual Employer to pay such monthly Contributions in full within the period established by the Trustees.
>
> Therefore, the amount of damage to the Trust from such failure shall be presumed to be, for each month of delinquency, 10% of the amount of the Contribution or Contributions due for the first month of the delinquency and, in addition thereto, 1-1/2% per month for each additional month said delinquency remains uncured. Liquidated damages for subsequent delinquent monthly Contributions, if any, shall be separately calculated for each separate month on the same basis as the first month and the total liquidated damages for all delinquent Contributions shall be cumulative and arrived at by adding the total of the liquidated damages calculated separately for each month of delinquent Contributions.

General Counsel computed liquidated damages due the pension fund in accord with this formula, which I find appropriate, and correctly determined liquidated damages due this fund totalled $589.07 as of January 9, 1991, with continuing accrual at the rate of $3.21 per month until the contributions are paid.

Amendment 5 contains the same formula at article IV, section 3(d). Noting that it bears the signatures of union trustees and employer trustees, and one of the latter is acknowledged in Respondents' posttrial brief to be counsel for and trustee of both the health and welfare and pension funds, and further noting that health and welfare funds are in the nature of insurance funds, and no funds other than pension and health and welfare are referred to in the collective-bargaining agreement, I find and conclude Amendment 5 relates to the health and welfare trust fund, was an amendment thereto, dated after the effective date of the collective-bargaining agreement but during its term, and contains the method of computing damages in effect at the time of the unfair labor practices found in the Board's decision and now. Accordingly, I adopt General Counsel's computation of liquidated damages owed the health and welfare fund in the amount of $1197.60 to January 9, 1991, with continuing accrual of $7.20 per month until contributions are paid.[13]

[Recommended Order omitted from publication.]

[13] Should the Board determine Amendment 5 and/or Midwest Pension Fund are not controlling, I recommend the liquidated damages be computed in accord with article XXI of the collective-bargaining agreement.